TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. ~~605~~ 235.

THE UNITED STATES, APPELLANT,

vs.

GEORGE P. LIES & CO.

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITION FILED SEPTEMBER 21, 1896.

CERTIORARI AND RETURN FILED OCTOBER 24, 1896.

(16355.)

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 606.

THE UNITED STATES, APPELLANT,

vs.

GEORGE P. LIES & CO.

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

INDEX.

United States circuit court for the southern district of New York. In the matter of the application of Geo. P. Lies & Co. for a review of the decision of the general appraisers, as to the rates and amount of duties on certain merchandise imported by them per S. S. "Rotterdam." Date of entry, June 30/90. Entry No. 104642, W. H. 12538.

To the honorable the circuit court of the United States for the southern district of New York:

Your petitioners, Geo. P. Lies & Co., being dissatisfied with a decision made on or about the 18th day of July, 1893, by the Board of General Appraisers designated by the Secretary of the Treasury, for and on duty at the port of New York, reviewing and affirming the decision of the collector of the port of New York as to the rate and amount of duty chargeable on certain merchandise imported at said port by your petitioners, as above specified, respectfully make application to the court and set forth herein the errors of law and fact complained of, to wit:

The said merchandise consists of a consignment, among other goods, of leaf tobacco. The same was classified and assessed by said collector for duty at the rate of 75 cents per pound. Your petitioners being dissatisfied with the said decision, gave notice to said collector accordingly within ten days after the ascertainment and liquidation of the duties as aforesaid, setting forth the reasons for their objection thereto, claiming the said merchandise to be dutiable at 35 cents per pound under Schedule F of the act of March 3, 1883, Heyl., 247.

Thereafter the said Board of General Appraisers, proceeding to hear and determine the questions of law and fact involved in said matters, affirmed the decision of the said collector in the premises.

And for the errors of law and fact in the decision of the said Board herein complained of your petitioners say:

First. That said Board of Appraisers erred as a matter of fact in finding that the returns of the local appraiser as to the character of said tobacco were correct.

Second. That said Board of Appraisers erred as matters of law:

(a) In affirming in any particular the collector's decision herein, so far as the same operated to impose a duty of seventy-five cents per pound on any of said tobacco.

(b) In holding that the returns of the local appraisers as to the character of said tobacco were correct.

(c) In holding that an examination of one bale in ten of a plantation lot is a lawful examination of said tobacco for the purpose of establishing the dutiable character of the same under Schedule F of the tariff act of March 3d, 1883.

(d) In holding that upon the examination made of said tobacco any portion thereof was dutiable at more than thirty-five cents per pound.

(e) In holding that upon the examination made of said tobacco any portion thereof, except the bales actually examined, was dutiable at more than thirty-five cents per pound.

(f) In holding that in the reliquidation of the entries of said tobacco the lots must be prorated according to the return of the local appraiser, "that is to say, that the proportion of the aggregate weight of the total number of bales examined in a lot to be dutiable at seventy-five cents, or thirty-five cents a pound shall be estimated according
8 to the proportion of the number of bales examined and returned by the appraiser as containing upwards of 85 % or less of wrapper tobacco."

(g) In failing to consider and decide upon their merits each and every of the clauses and allegations contained in your petitioners' protest.

Accordingly, your petitioners respectfully pray the court to order the said Board of General Appraisers to return to the court the record and evidence taken by the said Board, together with a certified statement of the facts involved in the above case, and of its decision thereon; and thereupon, and upon such further evidence as may be
9 hereafter taken pursuant to the statute in such cases made and provided, to proceed to review said decision, and to determine the questions of law and fact involved in same.

Dated New York, 189 .

GEO. P. LIES & CO.,
Petitioners.

By CURIE, SMITH & MACKIE,
Attorneys, 44 and 46 Exchange Place, New York City.

10 4 (Endorsed:) 1425. United States circuit court for the southern district of New York. In the matter of the application of Geo. P. Lies & Co. for a review of the decision of the General Appraisers as to the rate and amount of duties on certain merchandise imported by them per S. S. "Rotterdam," June 30/90. E. No. 104642 W. H. Petition. Curie, Smith & Mackie, attorneys for petitioners, 44 & 46 Exchange Place, New York City. U. S. circuit court. Filed Aug. 15, 1893. John A. Shields, clerk.

11 Know all men by these presents that I, Wm. H. Northup, am held and firmly bound unto the United States of America in the sum of fifty dollars, to be paid to the said United States of America, for the payment of which well and truly to be made I bind myself, my heirs, executors, and administrators jointly and severally firmly by these presents. Sealed with my seal and dated the 15th day of August, in the year of our Lord one thousand eight hundred and ninety-three.

12 Whereas, Geo. P. Lies & Co. have applied to the circuit court of the United States for the southern district of New York for a review of the questions of law and fact involved in certain decisions of the Board of United States Appraisers made upon the entry of certain merchandise imported by them per S. S. "Rotterdam," June 30/90. E. No. 104642 W. H.

Now, therefore, the condition of this obligation is such that if the above-named Geo. P. Lies & Co. shall prosecute said proceeding with effect, and pay all damages and costs which shall be awarded against them therein if they shall fail to make said proceeding good,
13 5 then this obligation shall be void; otherwise, the same shall be and remain in full force and effect.

WM. H. NORTHUP. [SEAL.]

Sealed and delivered and taken and acknowledged this 15th day of Aug., 1893, before me.

[SEAL.] THOS. H. THOMPSON,
Notary Public, Kings County.

Certificate filed in New York Co.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

Wm. H. Northup, being duly sworn, deposes and says that he does business in the southern district of New York, in the city of New 14
York; that he is worth the sum of one hundred dollars over and above all his just debts and liabilities.

WM. H. NORTHUP.

Sworn to before me this 15th day of Aug., 1893.

[SEAL.] THOS. H. THOMPSON,
Notary Public, Kings County.

Certificate filed in New York Co.

This bond is approved as to form and amount and sufficiency of surety.

Dated New York, Aug. 15, 1893. 15

E. H. LACOMBE.

(Endorsed:) 1425. United States circuit court for the southern district of New York. In the matter of the application of Geo. P. Lies & Co. for a review of the decision of the General Appraisers, as to the rates, &c., of duties on certain leaf tobacco imported by them per S. S. "Rotterdam," June 30/90; E. No. 104642. Bond for costs on application for review. Curie, Smith & Mackie, attorneys for petitioners, 44 & 46 Exchange Place, New York City. U. S. circuit court. Filed Aug. 15, 1893. John A. Shields, clerk.

6 At a stated term of the United States circuit court for the 16
southern district of New York, held at the United States court and post-office building, in the city of New York, on the 15th day of Aug., 1893.

Present, Hon. E. Henry Lacombe, circuit judge.

In the matter of the application of Geo. P. Lies & Co. for a review of the decision of the General Appraisers, as to the rates, &c., of 17
duties on certain leaf tobacco imported by them per S. S. "Rotterdam," Jun. 30/90; E. No. 104642 W. H.

Upon reading and filing the annexed petition of Geo. P. Lies & Co., importers of the merchandise therein described, and on motion of Curie, Smith & Mackie, attorneys for said petitioners,

It is ordered, that the Board of Appraisers at the port of New York return to this court the record and the evidence taken by them in each of the above-entitled matters, together with a certified statement of the facts in the case and their decision thereon. 18

E. H. LACOMBE.

(Endorsed:) 1425. United States circuit court for the southern district of New York. In the matter of the application of Geo. P.

Lies & Co. for a review of the decision of the General Appraisers, as to the rates, &c., of duties on certain leaf tobacco imported by them per S. S. "Rotterdam," June 30/90; E. No. 104642 W. H. Summons to return record. Curie, Smith & Mackie, attorneys for petitioners, 44 & 46 Exchange Place, New York City. U. S. circuit court. Filed Aug. 15, 1893. John A. Shields, clerk.

19 7 In the circuit court of the United States for the southern district of New York. In the matter of the application of Geo. P. Lies & Co. for a review of the decision of the General Appraisers, as to the rates and amount of duties on certain merchandise imported by them per S. S. "Rotterdam," June 30, 1890. Suit No. 1425. Return of the Board of United States General
20 Appraisers to the order of Hon. E. Henry Lacombe, circuit judge. Dated New York, September 13, 1893.

The Board of United States General Appraisers, sitting at New York, in response to the order of the court in the above matter, make the following return of the record and evidence taken by them in the above matter, and of the facts involved therein, as ascertained by them.

They state that on the 15th day of September, 1890, a letter dated
21 September 13, 1890, was received from the collector of customs at New York, a copy of which is returned herewith and marked Exhibit A, submitting under the provisions of section 14 of the act of June 30, 1890, the protest described and marked as follows: Exhibit B.

Coll's No.	Board No.	Protester.	Vessel.	Date of entry.
12538.	243—A.	Geo. P. Lies & Co.	Rotterdam.	June 30/90.

22 8 EXHIBIT A.

CUSTOM-HOUSE, NEW YORK CITY,
Collector's Office, Sept. 13, 1890.

To the Hon. Board of U. S. Gen'l Appraisers, New York.

GENTLEMEN: In pursuance of the requirements of sec. 14, act of June 10, 1890, I transmit herewith the protests, viz: 12,538, Geo. P. Lies & Co., from the assessment of duty by this office at the rate of 75 cents per pound on certain so-called "leaf tobacco," imported by them in the vessels named.

23 I have to state that the appraiser reported that a certain portion of the tobacco included in the above importations was of the requisite size, fineness of texture, etc., to be suitable for wrappers, and upon that portion only duty was assessed at the rate of 75c. per lb. under the provisions of T. I. new 246, S. 7350, 8299, & 8368.

The entries and invoices covered by the above protests are enclosed herewith.

The naval officer concurs in the decision of this office.

Respectfully, yours,

24 (Signed) J. J. COUCH,
Special Deputy Collector.

(28 Encl.)
Received Sept. 15, 1890.

EXHIBIT B.

NEW YORK, *Sept. 5, 1890.*

Hon. JOEL B. ERHARDT,
Collector of Customs, New York.

SIR: We hereby protest against your decision, assessment, liquidation, and exaction of duties as made by you on our importations below mentioned, of certain leaf tobacco, not stemmed, claiming said tobacco to be dutiable only at 35c. per pound, under the provision (247) of Schedule F, act March 3, 1883, and submit the following grounds separately, in support of our protest:

First. We protest against the estimate or determination of quantity of the different grades of said tobacco, as made by the appraiser or by yourself, and the assessment of 75 cents per pound as made by you, as unlawful and as not in accordance with the provisions of Schedule F of the act of March 3, 1883, claiming all of said tobacco to be dutiable under said provision at only 35 cents per pound, because eighty-five per cent of said leaf tobacco is not of the requisite size and of the necessary fineness to be suitable for wrappers and less than one hundred leaves are required to weigh a pound.

Second. That the standard grade of said tobacco, ascertained in accordance with commercial usage, is less than the limitation specified in Schedule F, act March 3, 1883 (par. 246), and is therefore dutiable at only 35 cents per pound, as provided under par. 247 of said schedule and act.

Third. We further protest against the classification of any of the leaves in any of the bales at 75 cents per pound which have not been examined, as illegal and contrary to law; a classification without examination; a pretended statement of facts the truth of which has not been ascertained by proper and legal examination.

Fourth. We further protest against the classification of any bale or portion of a bale at 75 cents per pound upon the partial examination of the bale only, as a classification without proper and legal examination.

Fifth. We further protest against the classification of any or all of the tobacco in bales not examined, at 75 cents per pound, upon the basis of the appraiser's return of those examined, as illegal and contrary to law and said schedule and act.

Sixth. That there is but one grade of said tobacco put up in the usual manner, and any attempt to separate the leaves as they exist in the hands for the purpose of making different grades of leaf tobacco, for purpose of classification, is illegal and contrary to law and the provision of Schedule F, act March 3, 1883.

Seventh. That any attempt to make such a separation without a bona fide examination and inspection of all leaves contained in the importation is illegal and unwarranted by law and said schedule and act.

Eighth. We protest against the storing of the bales ordered for examination in any artificially heated place, and the testing of said tobacco in such a dry and artificial condition as illegal and contrary to law and said schedule and act.

Ninth. We claim that in ascertaining the grade of said tobacco for purpose of classification, the hand should be taken as the unit of quantity, and that where less than eighty-five per cent of leaf in the hand is of the requisite size and of the necessary fineness of texture to be suitable for wrappers, and of which less than one hundred
31 11 leaves are required to weigh a pound, then such hand of tobacco is dutiable at only 35 cents per pound, as provided in Schedule F of act of March 3, 1883 (par. 247). Claiming said tobacco to be under said limit; or

Tenth. That in ascertaining the grade of said tobacco for purpose of classification, the bale should be taken as the unit of quantity, and where the bale does not contain eighty-five per cent of hands of the necessary fineness and lightness as aforesaid, then the whole bale is dutiable at only 35 cents per pound, under Schedule F, act March 3, 1883 (par. 247); or

32 Eleventh. That in ascertaining the grade of said tobacco for purpose of classification, the bale should be taken as the unit of quantity, and that where less than eighty-five per cent of the bale is of the requisite size and of the necessary fineness of texture to be suitable for wrappers, and of which less than one hundred leaves are required to weigh a pound, then such bale of tobacco is dutiable at only 35 cents per pound, as provided in Schedule F, act March 3, 1883 (par. 247). Claiming said tobacco to be under such limit; or

Twelfth. That in ascertaining the grade of said tobacco for purpose of classification, the invoice quantity should be taken as the unit of
33 quantity, and that where less than eighty-five per cent of the invoice quantity is of the requisite size and of the necessary fineness of texture to be suitable for wrappers, and of which less than one hundred leaves are required to weigh a pound, then such invoice quantity of tobacco is dutiable at only 35 cents per pound, as provided in Schedule F (par. 244) of act of 1883. Claiming such tobacco to be under said limit; or

Thirteenth. That in the absence of actual weight, ascertained in the legal manner, said tobacco is chargeable under Schedule
34 12 F, act March 3, 1883, at no more than 35 cents per pound, because less than eighty-five per cent of the U. S. weigher's return of said tobacco is not of the requisite size and of the necessary fineness of texture to be suitable for wrappers, and that less than one hundred leaves are required to weigh a pound; or

Fourteenth. That if it be held that the hand is the legal unit of quantity, then if there is not eighty-five per cent of hands which contain eighty-five per cent of leaf of the requisite size, texture, and lightness as aforesaid in a bale, the whole bale is dutiable at no more than
35 35 cents per pound, and we claim said tobacco to be under such limit; or

Fifteenth. That if it be held that the bale is the legal unit of quantity, then if there is not eighty-five per cent of the bales in an invoice which contain eighty-five per cent of leaf of the requisite size, texture, and lightness as aforesaid, the whole invoice quantity is dutiable at no more than 35 cents per pound, and we claim said tobacco to be under said limit.

Sixteenth. We further claim that there has been no legal examination, appraisal, or classification of said tobacco; that the provisions of sections 2901 and 2939, U. S. Revised Statutes, have been com- 36
plied with.

Seventeenth. That the respective rates of duties have not been assessed upon weights legally ascertained, in that the provision of section 2980, U. S. R. S., has not been complied with; the duty of 75 cents per pound having been made upon an estimated weight made by the U. S. appraiser, instead of upon the actual quantity ascertained by the U. S. weighers, as provided by law.

Eighteenth. We further protest against the classification of
13 said tobacco without the opening and examination of the bales 37
designated and ordered to the public stores as illegal and not in conformity with the provisions of sec. 2901 and sec. 2939, U. S. R. S.

Nineteenth. We protest further that the examination of only ten hands of a bale instead of the whole of a bale designated and ordered for examination is not a compliance with the requirements of sec. 2901 and sec. 2939, U. S. R. S., and that the classification of said tobacco from such an examination is illegal and not made in accordance with law.

Twentieth. We protest further against the classification of any of said tobacco at 75 cents per pound upon the ground that there has 38
been no proper or legal examination to warrant such a classification and that the regulations of the Secretary of the Treasury with respect to the classification of said leaf tobacco has not been complied with.

Twenty-first. We claim that the method of determining the classification of said tobacco, as adopted by the appraiser or collector, is neither in compliance with the law nor with the existing regulations of the Secretary of the Treasury; that there has been no actual determination of the number of leaves of the higher grade by actual examination, assortment, and weighing of the different grades of 39
leaves in any given pound, hand, or any given number of hands, bale, lot, or invoice quantity, and therefore the assessment of 75 cents per pound on any of said leaf tobacco is illegal and done without sanction of law, there having been no legal ascertainment of grade or weight.

Twenty-second. We claim that the examination of the tobacco made by the examiner was not such an examination as was required
by sections 2901 and 2939 of the Revised Statutes and by
14 other provisions of law, nor conformably to the instructions of
the Secretary of the Treasury; that no sufficient examination 40
of the tobacco was made to ascertain whether 85 per cent was of the requisite size and fineness of texture to be suitable for wrappers, and whether more than one hundred leaves were required to weigh a pound.

Twenty-third. That the leaf tobacco in question, if found to be uniform in its putting up and packing, so as to constitute but one kind or line of tobacco, then if eighty-five per cent of it was not of the size and of the fineness and of the weight specified in paragraph 246, then the whole lot was dutiable at only 35 cents per pound under paragraph 247 of said schedule and act; and we claim it to be 41
of such uniformity and under such limitation.

Twenty-fourth. We therefore give notice that we pay all other higher rates than is claimed above as the legal rate, under compulsion and to obtain possession of our goods; and we also give notice that we do not intend by this protest to relinquish or waive any right we may have to a refund of the difference between the duty exacted of us and any less duty which may hereafter be adjudged the legal duty upon said goods, intending this protest to be made against the present duty charged upon said goods, claiming that said duty is not the legal
42 duty to which said goods are chargeable, holding you and the Government responsible for all excess of duty exacted by you upon said goods above the legal duty, and protesting against all illegal exactions of duty thereon, and hereby give notice that we intend this protest to apply to all future similar importations by us, and also intend the duplicate protest herewith submitted for transmission by you to the Secretary of the Treasury, under the rules of your office, to be an appeal to him from your decision and to likewise apply to all future similar importations by us.

43

15 Vessel.	From—	Date of entry.	Entry No.	If wareh'se, w. h. bond.	Liquidation.	Marks and numbers.
"Rotterdam".	Amsterdam.	June 30, 1890	104,642	37	Aug. 26, 1890	L. C. 101/192 193/410 and others, as per invoices and entry.

GEO. P. LIES & CO.

CHAS. CURIE,
Attorney, 44 and 46 Exchange Place, N. Y.,
For Geo. P. Lies & Co.

(Endorsed:) 245 A. 12538. Geo. P. Lies & Co. "Rotterdam." Tobacco. W. "Rotterdam," June 30/90; Liq. Aug. 26/90. Pro.
44 Sep. 5/90. Custom-house, New York, Sep. 5, 1890. Received.

That on the 18th day of July, 1893, the Board of General Appraisers rendered its decision in the matter of said protest No. 243–A, a copy of which is hereto annexed and marked Exhibit C.

EXHIBIT C.

(G. A. 2212.)

[Leaf tobacco under act of 1883—Unopened bales—Method of computing duty.]

45 Before the U. S. General Appraisers at New York, July 18, 1893. In the matter of the protests, 120 A–12349, etc., of Simon Auerbach & Co. and others against the decision of the collector of customs at New York as to the rate and amount of duties chargeable on certain leaf tobacco, imported per the vessels and at the dates specified in the annexed schedule.

46 16 *Opinion by Wilkinson, General Appraiser.*

The merchandise is leaf tobacco, imported prior to October 1, 1890, and assessed for duty under the tariff act of March 3, 1883.

The protests embrace twenty-four clauses or objections, all of which, for the purposes of this decision, it is not deemed material to enumerate or consider.

The United States circuit court of appeals recently decided in the case of Blumlein, and we so hold in the cases now under consideration, that the bale is the unit, and that a bale of leaf tobacco of which 47
85 per cent is of the requisite size, fineness, and weight is dutiable at 75 cents, and when there is a less percentage at 35 cents, per pound.

A point which the court did not feel called upon to decide, but which is raised in the protests before us, and which is now raised by the appellants, is that no bales of tobacco other than those actually opened and examined by the appraiser and found to contain more than the requisite 85 per cent are liable to a higher rate of duty than 35 cents a pound.

We are of the opinion that an examination of one bale in ten, of plantation lots, is a fair and lawful examination of merchandise, and is in accordance with section 2901, Revised Statutes. While such 48
an examination might not furnish a precise description of the goods, there is no reason to suppose that it would not be as favorable to the importer as to the Government.

It is difficult, it is true, to decide just what bales are represented by the bales examined, inasmuch as the bales ordered to the public stores were not selected serially from decades.

In the absence of the merchandise and of any evidence to impugn the returns of the appraiser or to show the character of the tobacco, we find that the returns were correct, and, in accordance there-
17 with, we hold that in the reliquidation the lots must be pro- 49
rated according to such returns; that is to say, that the proportion of the aggregate weight of the total number of bales examined in a lot, to be dutiable at 75 cents or 35 cents a pound, shall be estimated according to the proportion of the number of bales examined and returned by the appraiser as containing upward of 85 per cent or less of wrapper tobacco.

To this extent the protests are sustained. Otherwise the decisions of the collector are affirmed.

H. M. Somerville,
Charles H. Ham,
J. B. Wilkinson, Jr.,
Board of U. S. General Appraisers. 50

And for a certified statement of the facts involved in said matter, as ascertained by them, the said Board states that said facts are fully set forth in the decision aforementioned, and that no other facts were ascertained by said Board than such as are shown by said decision and other exhibits hereto attached.

H. M. Somerville,
Charles H. Ham,
J. B. Wilkinson, Jr., 51
Board of U. S. General Appraisers.

(Endorsed:) No. 1425. U. S. circuit court, southern district of New York. In the matter of the application of Geo. P. Lies & Co.

for a review of the decision of the General Appraisers, as to the rates and amount of duties on certain merchandise imported by them per S. S. "Rotterdam," June 30, 1890. Return of record, evidence, and facts by Board of U. S. General Appraisers. U. S. circuit court. Filed Sep. 18, 1893. John A. Shields, clerk.

52 18 United States circuit court, southern district of New York. In the matter of the application of George P. Lies & Co., for review of the decision of the General Appraisers, as to the rates, &c.,
53 of duties on certain merchandise imported by them per S. S. "Rotterdam," June 30/90; 104,642 W. H. No. 1425.

To the honorable the circuit court of the United States for the southern district of New York:

Your petitioners, George P. Lies & Co., respectfully represent:

First. That a return from the Board of United States General Appraisers in the above-entitled matter was filed in the office of the clerk of this court on the 18th day of September, 1893.

54 Second. That your petitioners desire to present further evidence in the above-entitled matter.

Wherefore your petitioners pray that an order be made referring said matter to one of the general appraisers to take and return to said court such further evidence as may be offered.

Dated Oct. 7th, 1893.

CURIE, SMITH & MACKIE,
Attys. for Petitioners.

55 19 Upon reading and filling the foregoing petition of George P. Lies & Co., and on motion of Charles Curie, attorney for said petitioners,

It is ordered, That the above-entitled matter be and the same hereby is referred to General Appraiser George H. Sharpe, to take and return to this court such further evidence as may be offered in said matter.

Dated, Oct. 7, 1893.

E. HENRY LACOMBE.

(Endorsed:) No. 1425. United States circuit court for the south-
56 ern district of New York. In the matter of the application of Geo. P Lies & Co., for a review of the decision of the general appraisers as to the rates, &c., of duties on certain merchandise imported by them per S. S. "Rotterdam," June 30/90. Petition and order for further evidence. Curie, Smith & Mackie, attorneys for petitioners, 44 & 46 Exchange Place, New York City. U. S. circuit court.
57 Filed Oct. 7, 1893. John A. Shields, clerk.

58 20 United States circuit court, southern district of New York. In the matter of the application of Geo. P. Lies & Co., per "Rotterdam," June 30, 1890. No. 1425.

59 *To the circuit court of the United States for the southern district of New York:*

The undersigned, a General Appraiser under the act of June 10th, 1890, to whom it was referred by this honorable court by an order

made October 7, 1893, to take further evidence in the above-entitled matter, do hereby return such further evidence taken by me pursuant to such order.

Dated, New York, Dec. 7th, 1895.

GEORGE H. SHARPE,
United States General Appraiser, as an Officer of the Court. 60

21 United States circuit court, southern district of New York. 61
In the matter of the application of Geo. P. Lies & Co. for a review of the decision of the Board of U. S. General Appraisers as to certain importations per "Rotterdam," June 30, 1890. No. 1425.

Testimony taken before Hon. George H. Sharpe, as an officer of the court, in the above-entitled matter, pursuant to an order of reference made by said court, dated October 7, 1893. 62

NEW YORK, *March 27th, 1895.*

Appearances:

For the importers: Curie, Smith & Mackie. (D. I. Mackie, of counsel.)

For the collector and Government: James T. Van Rensselaer, asst. U. S. attorney.

Mr. MACKIE. I offer in evidence the entry in this case by the "Rotterdam," June 30, 1890, entry No. 104642, and the invoice and other papers accompanying the same or thereto attached, with the exception of the protest. 63

Importers rest.

Adjourned without fixing date for further hearing.

Testimony closed.

(Endorsed:) United States circuit court, southern district of New York. In the matter of certain merchandise imported by Geo. P. Lies & Co., per "Rotterdam," June 30, 1890. No. 1425. Testimony. U. S. circuit court. Filed Dec. 7, 1895. John A. Shields, clerk.

22 U. S. circuit court, southern district of New York. In the 64
matter of the application of George P. Lies, constituting the firm of George P. Lies & Company, for a review of the decision of the General Appraisers, as to the rates and amount of duties 65
on certain merchandise imported by them per S. S. "Rotterdam," June 30th, 1890. 1425.

SIRS: Please take notice that on the proceedings herein, a motion will be made before Hon. Hoyt H. Wheeler, U. S. judge, at the United States court room, in the city of Brooklyn, Kings County, N. Y., in this circuit, on the 15th day of January, 1896, at 11 o'clock a. m., or as soon thereafter as counsel can be heard, to vacate and set aside the judgment entered herein on the 19th day of December, 66
1895, and to resettle the same, and to substitute therefor, as of that

date, the form of said judgment order as hereto annexed, a copy of which is herewith served.

Yours, &c.,

WALLACE MACFARLANE,
U. S. Attorney, Attorney for United States.

To Messrs. CURIE, SMITH & MACKIE,
Attorneys for Importers, 44 Exchange Place, N. Y. City.

67 23 At a stated term of the United States circuit court for the southern district of New York, held at the U. S. circuit court rooms, at the Post-Office building, in the city of New York, on the 19th day of December, 1895.

Present, Hon. Hoyt H. Wheeler, judge.

68 In the matter of the application of George P. Lies, et al., constituting the firm of George P. Lies & Company, for a review of the decision of the General Appraisers as to the rates and amount of duties on certain merchandise imported by them per S. S. "Rotterdam," June 30th, 1890.—1425.

The above cause coming on for hearing and determination before this court, on the application of George P. Lies, et al., composing the
69 firm of George P. Lies & Co., importers, for a review of the questions of law and of fact involved in the decision of the Board of General Appraisers herein, and on the return of the Board of General Appraisers of the record and evidence taken by them, with their certified statement of the facts involved therein, together with their decision thereon, no petition for review of such decision of the Board of General Appraisers having been applied for by the collector or Secretary of the Treasury;

And the said George P. Lies & Company having conceded
70 24 in open court that there was no error in said decision of the Board of General Appraisers, and it having been contended on behalf of the collector and Secretary of the Treasury that the said decision of the Board of General Appraisers should be reversed for manifest error therein;

And the court having ruled that the collector and Secretary of the Treasury, or either of them, could not be allowed to impeach or in any way object to the said decision of the Board of General Appraisers, because they had not proceeded under the statute to seek a review of such decision of the said Board of General Appraisers;

Now, after hearing W. Wickham Smith, of counsel for said import-
71 ers, in support of the decision of said Appraisers, and Wallace Macfarlane, U. S. Attorney, in opposition thereto,

It is ordered, adjudged, and decreed that the decision of the Board of General Appraisers be and the same is hereby in all things affirmed.

(Signed) HOYT H. WHEELER.

It is hereby ordered that the foregoing judgment be substituted in the place of the judgment heretofore entered on December 20th, 1895,

and be filed as of that date, and that thereupon said previous judgment be vacated and set aside.

Jan. 15, 1896.

(Signed) HOYT H. WHEELER. 72

Consented to:

CURIE, SMITH & MACKIE,
Importers' Atty's.

(Endorsed:) "A," Suit No. 1425. U. S. circuit court for the second circuit. In the matter of the application of George P. Lies, constituting the firm of George P. Lies & Co., for a review of the decision of the General Appraisers as to the rates and amount
25 of duties on certain merchandise imported by them per S. S. "Rotterdam," June 30, 1890. Notice of motion and order. 73
(Judgment of affirmance.) Wallace Macfarlane, United States attorney, attorney for United States. Filed Decr. 20, 1895, as per order inside.

United States circuit court of appeals for the second circuit.

THE UNITED STATES, APPELLANT,
vs.
GEORGE P. LIES, ET AL., COMPOSING THE firm of George P. Lies & Co., appellees. } Suit No. 1425. 74

Assignment of errors.

The United States, appellant, hereby assigns error to the judgment of the circuit court of the United States for the southern district of New York, as follows: 75

First. In that it ordered, adjudged, and decreed that the decision of the Board of General Appraisers be in all things affirmed.

Second. In that it ruled that the collector and Secretary of the Treasury, or either of them, could not be allowed to impeach or in any way object to the decision of the Board of General Appraisers, because they had not proceeded under the statute to seek a review of such decision of the said Board of General Appraisers.

26 Third. In that it did not order, adjudge, and decree that all 76 of the tobacco classified for duty at the rate of seventy-five cents per pound by the collector, was lawfully so classified.

Fourth. In that it did not order, adjudge, and decree that the decision of said Board be reversed.

Dated, January 18, 1896.

WALLACE MACFARLANE,
United States Attorney, Attorney for Appellant.

(Endorsed:) "A," Suit No. 1425. U. S. circuit court of appeals for the second circuit. The United States, appellant, vs. George P. 77
Lies, et al., composing the firm of George P. Lies & Co., appellees. Assignment of errors. Wallace Macfarlane, United States attorney, attorney for collector. U. S. circuit court. Filed Jan. 18, 1896. John A. Shields, clerk. 78

79 27 United States circuit court, southern district of New York.

THE UNITED STATES OF AMERICA, APPELLANT,
vs.
GEORGE P. LIES ET AL., COMPOSING THE FIRM OF
80 George P. Lies & Co., appellees.

"A," Suit No. 1425.

Please take notice that the undersigned, on behalf of the collector of the port of New York and on the part of the United States, hereby appeals from the decision of this court rendered herein and entered on the 19th day of December, 1895, to the United States circuit court of appeals for the second circuit.

Dated New York, January 18th, 1896.

Yours, &c.,

WALLACE MACFARLANE,
81 *U. S. Attorney for the Southern District of N. Y.,*
Room 50, Post-Office Building, New York City.

To CURIE, SMITH & MACKIE, Esqrs.,
Attorneys for Importers, 46 Exchange Place, N. Y. City.

Appeal allowed.

E. HENRY LACOMBE,
U. S. Circuit Judge.

82 28 (Endorsed:) "A," Suit No. 1425. U. S. circuit court, southern district of New York. The United States of America, appellant, vs. George P. Lies et al., composing the firm of George P. Lies & Co. Notice of appeal. Wallace Macfarlane, U. S. attorney. To Curie, Smith & Mackie, esqrs., attorneys for appellees. Due service of a copy of the within notice of appeal is hereby admitted. Dated New York, Jan. 18, 1896. Curie, Smith & Mackie, attorneys
83 for appellants. U. S. circuit court. Filed Jan. 13, 1896. John A.
84 Shields, clerk.

85 29 United States circuit court of appeals for the second circuit.

THE UNITED STATES OF AMERICA, APPELLANT,
vs.
GEORGE P. LIES ET AL., COMPOSING THE
86 firm of Geo. P. Lies & Co., appellees.

"A," Suit No. 1425.

To the United States circuit court of appeals for the second circuit:

The Attorney-General of the United States hereby applies for the allowance of an appeal to the United States circuit court of appeals for the second circuit from the decision and judgment of the U. S. circuit court, rendered herein on the 19th day of December, 1895.

Dated January 18th, 1896.

87 JUDSON HARMON,
Attorney-General,
Per WALLACE MACFARLANE,
U. S. Attorney.

The foregoing application is granted and appeal allowed.
Dated New York, January 18th, 1896.

E. HENRY LACOMBE,
Judge of the U. S. Circuit Court of Appeals for the Second Circuit.

30 (Endorsed:) "A," Suit No. 1425. U. S. circuit court of 88
appeals for the second circuit. The United States of America, appellant, vs. George P. Lies et al., composing the firm of George P. Lies & Co. Application for and allowance of appeal. Wallace Macfarlane, U. S. attorney. To Curie, Smith & Mackie, esqs., attorneys for appellees. Due service of a copy of the within is hereby admitted. Dated New York, Jan. 18, 1896. Curie, Smith & Mackie, attorneys for appellees. U. S. circuit court. Filed Jan. 18, 1896. John A. Shields, clerk.

UNITED STATES OF AMERICA, *ss:*

To George P. Lies et al., composing the firm of George P. Lies & Co., 89
importers:

You are hereby cited and admonished to be and appear before the United States circuit court of appeals for the second circuit, at the city of New York, on the 15th day of February, 1896, pursuant to an appeal on the part of the United States, filed in the clerk's office of the circuit court of the United States for the southern district of New York, in a certain suit or proceeding, entitled "The United States of America, appellant, vs. George P. Lies et al., composing the firm of George P. Lies & Co., appellees," to show cause, if any there be, why the decision of the U. S. circuit court, in the said appeal mentioned, 90
should not be reversed, modified, or corrected, and speedy justice should not be done in that behalf.

Given under my hand, at the city of New York, in the southern district of New York, on the 18th day of January, 1896.

E. HENRY LACOMBE,
Judge of the U. S. Circuit Court of Appeals for the Second Circuit.

WALLACE MACFARLANE,
U. S. Attorney, on behalf of the United States, Appellant.

31 (Endorsed:) "A," suit No. 1425. U. S. circuit court of 91
appeals for the second circuit. The United States of America, appellant, vs. George P. Lies et al., composing the firm of George P. Lies & Co. Citation. Wallace Macfarlane, U. S. attorney. To Curie, Smith & Mackie, attorneys for appellees. Due service of a copy of the within citation is hereby admitted. Dated, New York, Jan. 18, 1896. Curie, Smith & Mackie, attorneys for appellees. U. S. circuit court, filed Jan. 18, 1896. John A. Shields, clerk.

UNITED STATES OF AMERICA, 92
Southern District of New York, ss:

I, John A. Shields, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, do hereby certify that the foregoing pages, numbered from one to twenty-seven, inclusive, contain a true and complete transcript of

the record and proceedings had in said court in the case of the United States, appellant, against George P. Lies & Co., appellees, as the same remain of record and on file in my office.

93 In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 13th day of February, in the year of our Lord one thousand eight hundred and ninety-six, and of the Independence of the said United States the one hundred and twentieth.

[SEAL.] JOHN A. SHIELDS, *Clerk.*

97 32, 33 United States circuit court of appeals for the second circuit.

THE UNITED STATES, APPELLANT,
vs.
GEORGE P. LIES ET AL., COMPOSING THE
98 firm of George P. Lies & Co., appellees. } Suit No. "A," 1425.

Stipulation.

It is hereby stipulated by and between the United States attorney for the southern district of New York in behalf of the United States, appellant, and the attorneys for the importers above mentioned, appellees, as follows:

Whereas none of the exhibits offered in evidence in this case in the circuit court below have been returned by the clerk of said court as part of the transcript of the record in this case, this present
99 stipulation shall be in lieu of such exhibits and shall be printed by the clerk of this circuit court of appeals as an addition to and as part of the printed record herein. The entry for warehouse of the merchandise in question bears date June 30, 1890, and covers two lots of Sumatra leaf tobacco not stemmed: One lot marked L. & Co., Nos. 101/192, ninety-two bales, and the other lot the same marks, Nos. 193/410, two hundred and eighteen bales, making an aggregate of 310 bales. Attached to said entry is the official weigher's special return of the merchandise, duly made by J. Jardine,
100 34 United States weigher, dated July 19, 1890, giving the gross weight of the tobacco, the actual and schedule tare, and the net weight of the tobacco; and on the back of said weigher's return appears a further return, showing the weight and tare of each and every one of the 310 bales of tobacco involved.

The invoice in evidence of the merchandise is in the German language, and is dated at Amsterdam, June 13, 1890, and is to Messrs. George P. Lies & Co., of New York, covering 310 bales of Sumatra tobacco, by the marks and numbers as stated in the foregoing entry, the gross weight and the tare being given in kilograms. This invoice was duly certified before the United States consul at Amster-
101 dam, and upon the face of the invoice appears the return in red ink, of the United States examiner at the port of New York: "Leaf tobacco, not stemmed, 35c. and 75c. Pars. 246 and 247, T. I. new." And on the back of said invoice appears in red ink the numbers of the bales of tobacco examined by the appraiser, with the note,

"Thirty-nine bales, as noted as per memo. attached, balance classified. July 19/90. C. H. R. D. F. Burke." And underneath, in blue ink, "Approved, M. W. Cooper, appraiser." Attached to the invoice appears the following table of returns made by Mr. Charles H. Roberts, U. S. examiner, of the bales ordered to the public store by the collector for examination and the percentages of each examined bale returned by the appraiser as dutiable at 35 cents and at 75 cents per pound respectively, which list is as follows: 102

35 Lots.	Plantation length & color marks.	Bales ordered for examination.	Percentage. 35c.	75c.	103
L & C 101/5	B B 1	105	80	20	
106/13	V 1	106		100	
114/16	G 1	116	70	30	
117/22	S 1	117	60	40	
123/52	S L 1	123	20	80	
	"	133	60	40	
	"	143	60	40	
153/63	S S 1	153	100		
	"	163	90	10	
164/92	S S L 1	164	30	70	
	"	174	10	90	
	"	184	60	40	
193/224	B B 1	193	100		104
	"	203	100		
	"	213	90	10	
	"	224	90	10	
225/27	L 1	225		100	
228/49	"	228	60	40	
	"	238	70	30	
228/49	V 1	249	40	60	
250/54	G 1	250	50	50	
255/62	K 1	262	20	80	
263/84	S 1	263	100		
	"	273	90	10	
	"	284	100		
285/337	S L 1	285	90	10	
	"	295	30	70	
	"	305	60	40	
	"	325	60	40	105
	"	337	60	40	
338/59	S S 1	338	100		
	"	348	90	10	
	"	359	70	30	
360/410	S S I 1	360	80	20	
	"	370	60	40	
	"	380	20	80	
	"	390	90	10	
	"	400	80	20	
	"	410	60	40	

July 19/90. C. H. R.

36 The tobacco was of uniform grade, and the examination of the representative bales by the Government officer was made by drawing not less than ten "hands" from each bale, the hand consisting of a certain quantity of leaves tied together by the stems. The collector classified the tobacco according to the percentages returned by the appraiser, dividing the examined bale and the lot represented by such bale into corresponding percentages of 75c. and 35c. tobacco. 106

CURIE, SMITH & MACKIE,
Attorneys for Importers.

WALLACE MACFARLANE,
U. S. Attorney, for the United States. 107

37 United States circuit court of appeals for the second circuit. No. 170. October term, 1895. Submitted April 23, 1896. Decided May 12, 1896. Appeal from the circuit court of the United States for the southern district of New York.

THE UNITED STATES, APPELLANT,
vs.
GEORGE P. LIES & CO., APPELLEES.

Before Judges WALLACE, LACOMBE, and SHIPMAN.

This is an appeal from a decision of the circuit court, southern district of New York, affirming a decision of the Board of General Appraisers.

LACOMBE, circuit judge. A certain importation of leaf tobacco was classified for duty by the collector at the port of New York, certain portions at 75 cents per pound, and certain other portions at 35 cents per pound. The importers being dissatisfied with such decision did within the proper time, in compliance with the provisions of sec. 14 of the customs administrative act of June 10, 1890, "give notice in writing to the collector, setting forth therein distinctly and specifically * * the reasons for their objections thereto." The collector thereupon transmitted the invoice and all the papers and exhibits connected therewith to the Board of General Appraisers. That Board in one particular sustained the protest of the importers, and in all other particulars affirmed the decisions of the collector.

38 Being dissatisfied with the decision of the Board, the importers applied to the circuit court for a review of the questions of law and fact involved in such decision, and filed, as the fifteenth section of the above-cited act requires, "a concise statement of the errors of law and fact complained of." Before the case was reached for hearing in the circuit court a decision of the Supreme Court was reported which satisfied the importers that they had no chance of success. Therefore, when the case was called, they conceded in open court that there was no error in the decision of the Board of General Appraisers, and the court adjudged that "the decision of the Board of General Appraisers be and the same is hereby in all things affirmed." The district attorney, on behalf of the United States insisted in the circuit court that that court should review the decision of the Board so far as it was favorable to the importers. This the court refused to do and the United States has appealed from such decision.

The circuit court was clearly right. Section 14 provides that the decision of the Board of General Appraisers "shall be final and conclusive upon all persons interested, and the record shall be transmitted to the proper collector * * who shall liquidate the entry accordingly, except in cases where an application shall be filed in the circuit court within the time and manner provided for in section fifteen of this act." Section 15 provides that "if the owner, importer, consignee, or agent of imported merchandise, or the collector, or the Secretary of the Treasury shall be dissatisfied with the decision of the Board of General Appraisers, as provided for in section fourteen of this act, as to the construction of the law and the facts respecting the classification of such merchandise and the

rate of duty imposed thereon under such classification, they, or either of them, may, within thirty days next after such decision, and not afterwards, apply to the circuit court * * * for a review of the questions of law and fact involved in such decison. Such application shall be made by filing in the office of the clerk of said circuit court a con-
39 cise statement of the errors of law and fact complained of, and a copy of such statement shall be served on the collector or on the importer, owner, consignee, or agent, as the case may be."

The elaborate argument submitted upon the question whether or not the Board of General Appraisers is a court, and whether Congress had power, under the Constitution, to clothe it with judicial powers is irrelevant. Congress has expressly provided, as it had the undoubted right to do, that the decision of the collector as to rate and amount of duties on imported merchandise shall be final and conclusive, unless these questions are brought before the Board of General Appraisers in the manner provided in the act; and that the decision of the Board shall be final and conclusive, except when application for a review is made to the circuit court in the manner provided in the act. Names are nothing; it is immaterial whether this is called an appeal, or a review, or a transmission of the case; any person who is dissatisfied with a decision of the Board must set forth his grounds of dissatisfaction and file the same in the circuit court, and may apply to that court for a review "within thirty days next after such decision, and not afterwards." If he fail to apply for a review within the time limited his remedy in the circuit court is lost. The case at bar is clearly distinguishable from Grisar v. McDowell (6 Wallace, 363), for in that case, as it is stated on p. 367, "a transcript of the proceedings and decision of the board [of land commissioners] was filed in the district court, this operating under the statute of August 31, 1852, as an appeal by the party against whom the decision was given." The customs administrative act of 1890 contains no such clause, nor anything like it.

The decision of the circuit court is affirmed.

Henry C. Platt, assistant United States attorney, for the appellant; William Wickham Smith, for the appellees.

40 At a stated term of the U. S. circuit court of appeals for the second circuit, held at the U. S. post-office and court-house building, in the city of New York, on the 27th day of May, 1896.

Present, the Hon. Wm. J. Wallace, Hon. E. Henry Lacombe, Hon. Nathaniel Shipman, judges.

THE UNITED STATES, APPELLANT, *vs.* GEORGE P. LIES ET AL., COMPOSING THE FIRM OF George P. Lies & Co., appellees.	Suit "A," ≠1425.

An appeal having been duly taken in this court from a judgment of the circuit court of the United States for the southern district of New York, entered December 19th, 1895, and said appeal coming on to be heard;

Now, after hearing Henry C. Platt, esq., assistant U. S. attorney, of counsel for appellant, for reversal, and W. Wickham Smith, esq., of counsel for appellees, for affirmance, and due deliberation having been had,

On motion of Curie, Smith & Mackie, attorneys for appellees,

It is ordered, adjudged, and decreed that the judgment of the said circuit court of the United States for the southern district of New York be, and the same hereby is, in all things affirmed; and it is further ordered that a mandate issue to the said circuit court directing that court to make and enter a judgment herein affirming the decision of the Board of General Appraisers in this case.

W. J. W.

N. S.

Consented to as to form.

WALLACE MACFARLANE,
U. S. Atty.

41 (Endorsed:) "A," 1425. U. S. circuit court of appeals, second circuit. The United States, appellant, vs. George P. Lies et al., composing the firm of George P. Lies & Co., appellees. Order for mandate. Curie, Smith & Mackie, attys. for importers, 46 Exchange Place, N. Y. City. United States circuit court of appeals, second circuit. Filed May 27, 1896. James C. Reed, clerk.

42 UNITED STATES OF AMERICA,
Southern district of New York, ss:

I, James C. Reed, clerk of the United States circuit court of appeals for the second circuit, do hereby certify that the foregoing pages, numbered from one to forty-one, inclusive, contain a true and complete transcript of the record and proceedings had in said court, in the case of the United States, appellant, vs. George P. Lies & Co., appellees, suit No. 1425, as the same remain of record and on file in my office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this eighteenth day of June, in the year of our Lord one thousand eight hundred and ninety-six, and of the Independence of the said United States the one hundred and twentieth.

[SEAL.] JAMES C REED, *Clerk.*

43 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America, to the honorable the judges of the United States circuit court of appeals for the second circuit, greeting:

Being informed that there is now pending before you a suit in which the United States is appellant and George P. Lies & Company are appellees, which suit was removed into the said circuit court of appeals by virtue of an appeal from the circuit court of the United States for the southern district of New York, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and removed into the

44 Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 20th day of October, in the year of our Lord one thousand eight hundred and ninety-six.

JAMES H. MCKENNEY,
Clerk of the Supreme Court of the United States.

45 (Indorsed:) Supreme Court of the United States, No. 606, October term, 1896. The United States vs. George P. Lies & Co. Writ of certiorari.

46 In the Supreme Court of the United States, October term, 1896.

THE UNITED STATES, APPELLANT,
vs.
GEORGE P. LIES & CO. } No. 606.

STIPULATION.

It is hereby stipulated between counsel for the parties to the above-entitled cause that the certified copy of the record of the cause in the circuit court of appeals for the second circuit now on file in the Supreme Court of the United States may be treated as the return to the writ of certiorari issued herein.

HOLMES CONRAD,
Solicitor-General.
W. WICKHAM SMITH,
Counsel for Respondent.

A copy:
[SEAL.] JAMES C. REED, *Clerk.*

47 *To the honorable the Supreme Court of the United States:*

The record and all proceedings in the cause whereof mention is within made having been lately certified and filed in the office of the clerk of the honorable the Supreme Court of the United States a certified copy of the stipulation of counsel is hereto annexed, and under the direction of counsel for the appellant said stipulation is certified as a return to this writ.

New York, October 23, 1896.

[SEAL.] JAMES C. REED,
Clerk of the United States Circuit Court of Appeals for the Second Circuit.

48 (Indorsed:) Case No., 16385. Supreme Court U. S. October term, 1896. Term No., 606. The United States, applt., vs. Geo. P. Lies & Co. Writ of certiorari and return. Filed Oct. 26, 1896.

PETITION FOR A WRIT OF CERTIORARI

No. 935

Brief of Atty. Gen. (Supplemental) with

for Appt. (Supplemental)

Filed Sept. 21, 1896.

In the Supreme Court of the United States.

OCTOBER TERM, 1896.

THE UNITED STATES, APPELLANT,
v.
GEORGE P. LIKE & CO., APPELLEES. } 606

APPLICATION AND MOTION FOR LEAVE TO SUBMIT ADDITIONAL BRIEF IN SUPPORT OF THE CLAIM OF APPEAL AND FOR ADVANCEMENT.

In the Supreme Court of the United States.

OCTOBER TERM, 1896.

THE UNITED STATES, APPELLANT,
v.
GEORGE P. LIES & CO., APPELLEES.

APPLICATION FOR WRIT.

On behalf of the United States, the Solicitor General respectfully prays for a writ of certiorari to be required to be certified to this court for review and determination, pursuant to the provisions of § 6 of the act entitled "An act to establish Circuit Courts of Appeals," etc., approved March 3, 1891, the cause originally entitled "In the matter of the application of Geo. P. Lies & Co., for a review of the decision of the General Appraisers as to the rates and amount of duties on certain merchandise imported by them per S. S. 'Rotterdam,' June 30th, 1890."

As I am informed by the Secretary of the Treasury, this case is one of 27 similar cases now pending in the United States Circuit Court for the Southern District of New York, involving an aggregate refund of more than $691,000.

Besides this large amount directly involved, the case is regarded as of great importance as establishing the procedure under the Customs Administrative Act upon review of decisions of the Board of General Appraisers.

Annexed hereto is a brief setting forth the questions arising upon this application and the authorities bearing thereon.

A certified copy of the entire record in the case in the Circuit Court of Appeals, including its opinion, is filed as part of this application.

HOLMES CONRAD,
Solicitor General.

In the Supreme Court of the United States.

OCTOBER TERM, 1896.

THE UNITED STATES, APPELLANT,
v.
GEORGE P. LIES & CO., APPELLEES.

BRIEF FOR APPELLANT ON APPLICATION FOR WRIT.

This case, the amount involved in which is very large, is a part of the well-known Sumatra leaf tobacco controversy. The merits of the question, however, were not considered in the court below. The point decided in that court was *quasi*-jurisdictional in character. The importers had filed in the United States Circuit Court an application for review of a certain decision of the Board of General Appraisers. The United States had filed no such application. When the decision came up to be reviewed, the United States attempted to show errors unfavorable to its own interests. The Circuit Court held that these errors had been waived by failure to file an application. This decision was affirmed by the Circuit

Court of Appeals; and, believing it to be erroneous, the present application for a writ of *certiorari* is made.

The merits of the case, as already stated, were not considered either by the Circuit Court or by the Circuit Court of Appeals. They are, as we shall show, already settled in favor of the Government's contention, by a decision of this court; so that, had the *quasi*-jurisdictional question not been raised, the decision of the Board of General Appraisers would necessarily have been reversed.

The controversy arose under paragraphs 246 and 247 of Schedule F in the tariff act of March 3, 1883, ch. 121, which are as follows:

> Leaf tobacco, *of which* 85% is of the requisite size and of the necessary fineness of texture to be suitable for wrappers, *and of which* more than 100 leaves are required to weigh a pound, if not stemmed, 75 cents per lb.
>
> All other tobacco in leaf, unmanufactured and not stemmed, 35 cents per lb.

Two questions arose under paragraph 246:

(1) What is this 85% a percentage of? What is the unit?

(2) Does this 85% apply to the weight of the leaves, or only to their size and fineness of texture?

These questions were considered in the cases of *United States* v. *Blumlein*, 14 U. S. App., 101, decided in 1893, and *Erhardt* v. *Schroeder*, 155 U. S., 124, decided in 1894.

The Government contention in these cases, upon the questions above stated, respectively, was as follows:

(1) The unit is the leaf. The paragraph describes a certain quality of tobacco leaf which contains less than 15% of surface too coarse for wrappers, and which is large enough to be used for that purpose after the coarse part is cut away. This contention was supported by references to the Congressional debates and by certain *dicta* in the case of *Falk* v. *Robertson*, 137 U. S., 225.

(2) The 85% does not apply to weight. The paragraph is to be construed as it reads, without any forced construction.

The Blumlein case overruled both these contentions, and held as follows:

(1) The unit is the bale.

(2) Notwithstanding the language of the paragraph, the 85% clause is to be read as referring to the weight as well as to the size and fineness.

The Erhardt case finally decided these two questions as follows:

(1) It held the bale to be the unit, to this extent sustaining the Blumlein case.

(2) It sustained the literal construction of the paragraph, to this extent overruling the Blumlein case. It held that the weight test as to each bale was the average weight of the leaves in that bale.

It is now settled, therefore, that the statute is to be read as follows:

> A bale of unstemmed leaf tobacco is dutiable at 75 cents per lb., if 85% of it is wrapper tobacco in

quality, and if the average weight of the leaves in the bale is 1/100 lb.

STATEMENT OF FACTS.

The peculiarities of the record in this case are easily accounted for, when the dates of the decisions above referred to are borne in mind.

These goods were imported before the decision in the Blumlein case. The Treasury Department were then following the Falk case as interpreted by it. Assuming the leaf to be the unit, and finding the tobacco often of mixed quality as to weight of leaf, the customs authorities first pursued the system of emptying the sample bale and giving it a complete examination. Some importers protested against this system as destroying the quality of the tobacco, and asked that the quality of the bale be tested by drawing samples therefrom. A bale of tobacco is made up of a large number of packages called "hands." The Treasury Department accordingly adopted the system of drawing ten "hands" from each sample bale. If all of these "hands" proved to be composed of 75 cent tobacco the whole bale was rated at that amount, and *vice versa*. If some only of the ten "hands" proved to be 75 cent tobacco, the bale was regarded as consisting part of the one kind and part of the other. Thus, if seven "hands" were found to contain 75 cent tobacco, the bale was rated as containing 70% of that variety and 30% of the other. (Syn. Dec., 6674, 7350, 8299, 8368.)

This course was followed in the present case, and the examiner's return is set forth at p. 35 of the record. The importers protested, and the protest, together with

the entries and invoices, was transmitted to the Board of General Appraisers in pursuance of the requirements of § 14 of the Customs Administrative Act (p. 8). An abstract of these papers is found at pp. 33–4. They throw no light upon the question of the average weight of the leaves in the bale. As was then customary, the examiner returned simply the general result of his examination of the ten "hands" in each sample bale, not stating whether the variations were in size, fineness, or weight of leaf. The importers stipulated, however, that the tobacco was of uniform grade, which apparently is intended to signify that the size and fineness of the leaves was uniform in all the bales examined. This is usually the fact, as in the *Blumlein Case*, 49 Fed. Rep., 228, 231, and *United States* v. *Rosenwald*, 35 U. S. App., 89, 93.

The Blumlein case was decided by the Circuit Court of Appeals April 18, 1893. There being no right of review by this court, the Treasury Department, on June 12, 1893, directed settlements to be made in accordance with that decision. (Syn. Dec., 14096.) Settlements of cases arising prior to the Customs Administrative Act thereupon commenced. The examiner's returns were taken as the basis. If the return contained the figures 100 or 90 in the last column (see record, p. 35), the whole bale was rated at 75 cents. Otherwise, it was all rated at 35 cents. It was entirely unnecessary to ascertain whether the variation in rating in the case of any sample bale was due to variation in size, fineness, or weight; for the Blumlein case held that weight, as well as size and fineness, was governed by the 85% rule.

On July 18, 1893, the Board of General Appraisers, likewise following the Blumlein case, rendered their decision upon these protests (pp. 15–17). This decision, so far as material, is as follows:

> That a bale of leaf tobacco, of which 85 % is of the requisite size, fineness, *and weight*, is dutiable at 75 cents, and when there is a less percentage, at 35 cents per pound. * * *
>
> That the returns were correct, and in accordance therewith we hold that in reliquidation the lots must be prorated according to such returns; that is to say, the proportion of the aggregate weight of the total number of bales examined in a lot, to be dutiable at 75 cents or 35 cents a pound, shall be estimated according to the proportion of the number of bales examined and returned by the appraiser as containing upward of 85 % or less of wrapper tobacco.
>
> To this extent the protests are sustained. Otherwise the decisions of the collector are affirmed.

This decision overruled a large number of points which had been taken in the protests (pp. 9–14), and to this extent it is admittedly correct (pp. 23, 24), the importers' concession to this effect being based upon the case of *United States* v. *Rosenwald*, 35 U. S. App., 89.

Owing to the Blumlein decision, and to the then acquiescence of the Treasury Department in that decision, the Government filed no application for review within the thirty days allowed by the Customs Administrative Act for that purpose. Such an application was, however, filed by the importers August 15, 1893 (pp. 1–4), in which they prayed the court as follows (p. 3):

> Your petitioners respectfully pray the court to order the said Board of General Appraisers to return

> to the court the record and evidence taken by the said Board, together with a certified statement of the facts involved in the above cause, and of its decision thereon; and thereupon, and upon such further evidence as may be hereafter taken pursuant to the statute in such cases made and provided, to proceed to review said decision and to determine the questions of law and fact involved in the same.

Within a few months thereafter the Treasury Department, being informed that the questions decided in the Blumlein case were about to come before this court in the Erhardt case before referred to, suspended settlements. The Erhardt case was argued January 24, 1894, and decided November 12, 1894. The Blumlein case being thus overruled in one essential particular, settlements in accordance therewith definitely ceased; and the question arose which is now presented to this court, namely, whether a petition for review filed by one party only brings the whole case before the court so that either party may be heard to impugn the decision in any particular.

CUSTOMS ADMINISTRATIVE ACT.

The question turns upon § 15 of the Customs Administrative Act of June 10, 1890, ch. 407, which provides for the proceedings commonly, but incorrectly, called appeals, by which a partial review of the General Appraisers' decisions is obtained from the Circuit Courts of the United States.

This section provides that the party dissatisfied with the decision of the General Appraisers as to the classifi-

cation of imported merchandise (as distinguished from valuation)—

> May, within thirty days next after such decision, and not afterwards, apply to the Circuit Court of the United States within the District in which the matter arises, for a review of the questions of law and fact involved in such decision. Such application shall be made by filing in the office of the Clerk of said Circuit Court a concise statement of the errors of law and fact complained of, and a copy of such statement shall be served [etc.]. * * * Thereupon the court shall order the Board of Appraisers to return to said Circuit Court the record and the evidence taken by them, together with a certified statement of the facts involved in the case and their decision thereon; and all the evidence taken by and before the said Appraisers shall be competent evidence before said Circuit Court.

After providing for the taking of further evidence upon the application of either party, the section proceeds as follows:

> And such further evidence, with the aforesaid returns, shall constitute the record upon which said circuit court shall give priority to and proceed to hear and determine the questions of law and fact involved in such decision respecting the classification of such merchandise and the rate of duty imposed thereon under such classification.

The remainder of the section is immaterial.

ARGUMENT.

I.

A proceeding in the United States circuit court is not an appeal.

It is not called an appeal in the statute. It is called an "application;" and the application is not allowed for the purpose merely of reviewing "the errors of law and fact complained of," although a "concise statement" of these errors is required from the applicant; but it must be made broadly "for review of the questions of law and fact involved in such decision." The Circuit Court must treat the application as such, and "proceed to hear and determine the questions of law and fact involved in such decision, involving the classification," etc. The application for review in the present case conforms to the requirements of the statute, and asks that the court order the General Appraisers to return to it their decision in the case, and that the court "proceed to review said decision and determine the questions of law and fact involved in the same" (p. 3).

Even, however, had the word "appeal" been used instead of "application," the result would be nowise different. The present statute is drawn somewhat on the lines of the original "Act to ascertain and settle the private land claims in the State of California" of March 3, 1851, ch. 41. § 9 of that act (9 Stat., 632) provided that after a decision of the Board of Land Commissioners either party could "present a petition to the District Court of the District in which the land claimed is situated, praying the said court to review the decision of

the said Commissioners, and to decide on the validity of such claim." This section was repealed in the following year by the Civil and Diplomatic Appropriation Act of August 31, 1852, ch. 108, § 12 (10 Stat., 99). This latter act expressly termed the proceeding "an appeal," but this was held immaterial by the courts, as will be shown.

The cases coming from this California Board of Land Commissioners are the ones most nearly in point here. We therefore set forth the material portions of the two sections wherein the procedure was indicated:

> Act of 1852, § 12. * * * And in every case in which the Board of Commissioners on Private Land Claims in California shall render a final decision, it shall be their duty to have two certified transcripts prepared of their proceedings and decision, and of the papers and evidence on which the same are founded, one of which transcripts shall be filed with the clerk of the proper District Court, and the other shall be transmitted to the Attorney-General of the United States. And the filing of such transcript with the Clerk aforesaid shall *ipso facto* operate as *an appeal for the party against whom the decision shall be rendered;* and if such decision shall be against the private claimant, it shall be his duty to file a notice with the Clerk aforesaid, within six months thereafter, of his intention to prosecute the appeal; and if the decision shall be against the United States, it shall be the duty of the Attorney-General, within six months after receiving said transcript, to cause a notice to be filed with the clerk aforesaid that the appeal will be prosecuted by the United States; *and on a failure of either party to file such notice with the clerk aforesaid, the appeal shall be regarded as dismissed.*

> Act of 1851, § 10. The District Court shall proceed to render judgment upon the pleadings and evidence in the case, and upon such further evidence as may be taken by order of the said court. * * *

In *United States* v. *Ritchie*, 17 How., 525, 533, it was held by this court that the section above quoted from the act of 1852 repealed § 9 of the act of 1851. An objection made to the constitutionality of the act was met by the court, speaking through Mr. Justice Nelson, as follows (pp. 533–4):

> It is also objected, that the law, prescribing an appeal to the district court from the decision of the board of commissioners, is unconstitutional; as this board, as organized, is not a court under the constitution, and can not, therefore, be invested with any of the judicial powers conferred upon the General Government. *American Ins. Co.* v. *Canter*, 1 Pet., 511; *Benner* v. *Porter*, 9 How., 235; *United States* v. *Ferreira*, 13 ibid., 40.
>
> But the answer to the objection is, that the suit in the district court is to be regarded as an original proceeding, the removal of the transcript, papers, and evidence into it from the board of commissioners being but a mode of providing for the institution of the suit in that court. The transfer, it is true, is called an appeal; we must not, however, be misled by a name, but look to the substance and intent of the proceeding. The district court is not confined to a mere reexamination of the case as heard and decided by the board of commissioners, but hears the case *de novo*, upon the papers and testimony which had been used before the board, they being made evidence in the district court; and also upon such further evidence as either party may see fit to produce.

The applicability of these remarks to the statute under consideration in the case at bar will be seen at once.

II.

When one party files an application for review, it is unnecessary for the other party to file any answer, cross-notice, or other paper in order to give the court jurisdiction over the whole case.

No such paper is called for by the statute. That it is unnecessary is implied in the language of the statute. It is expressly provided that the court shall review not alone "the errors of law and fact complained of" by the applicant, but "the questions of law and fact involved in such decision." Nor is there any inherent necessity for an answer or cross-notice.

There is nothing new or anomalous about such a procedure. When one asks a court of chancery to open an account, and obtains an interlocutory decree to that end, even though the reopening is stoutly resisted by the defendant, a final decree against the complainant, and finding a balance in defendant's favor, is not impossible. (See 1 Story, Eq. Jur., § 522.) When several pleas are pleaded by defendant to a declaration or complaint, and one of these pleas is demurred to, the demurrant often can not obtain final judgment upon the hearing; yet the defendant may point out defects in the declaration or complaint, and himself obtain final judgment upon the demurrer, although he is not the moving party. (*Cooke* v. *Graham's Adm'r*, 3 Cr., 229–235; *Hudson Canal Co.* v. *Pennsylvania Coal Co.*, 8 Wall., 276, 284.)

We have, however, a decision almost precisely in point in *Grisar* v. *McDowell*, 6 Wall., 363, decided by this court under the California acts above quoted, at December Term, 1867.

In this case plaintiff claimed title to certain land by conveyance from the City of San Francisco. Defendant, Gen. McDowell, claimed to hold it as an officer of the United States Government. The question of title turned upon a proceeding which had been conducted by the City of San Francisco before the Board of Land Commissioners to establish a Mexican grant. The commissioners decided partly in favor of San Francisco and partly in favor of the United States. Accordingly, by the act of 1852, above quoted, a transcript of such decision, filed with the clerk of the United States District Court, operated *ipso facto* as "an appeal" for both parties. Each party filed a notice of intention to prosecute the appeal. The Attorney General, however, by formal notice and stipulation, *dismissed the appeal of the United States.* It will thus be perceived that the case was much stronger against the United States than the present; and it was insisted upon the argument that the United States was debarred upon the subsequent hearing of the city's appeal from reasserting its own claims.

Mr. Justice Field, delivering the opinion of this court, discussed the question as follows (pp. 374–5):

> The appeal was by statute for the benefit of the party against whom the decision was rendered; in this case of both parties—of the United States, which contested the entire claim, and of the city, which asserted a claim to a greater quantity than that confirmed—and both parties gave notice of their

> intention to prosecute the appeal. Subsequently, in February, 1857, the Attorney-General withdrew the appeal on the part of the United States, and in March following the District Court, upon the stipulation of the district attorney, ordered that appeal to be dismissed, and gave leave to the city to proceed upon the decree of the board as upon a final decree. The counsel of the plaintiff contend that this decree closed the controversy between the city and the United States as to the lands to which the claim was confirmed. But in this view they are mistaken. Had the city accepted the leave granted, withdrawn her appeal, and proceeded under the decree as final, such result would have followed. But this course she declined to take. She continued the appeal for the residue of her claim to the four square leagues. *This kept open the whole issue with the United States.* The proceeding in the District Court, though called in the statute an appeal, was not in fact such. It was essentially an original suit, in which new evidence was given *and in which the entire case was open.*

After quoting from the opinion in *United States* v. *Ritchie*, *supra*, the learned justice proceeds as follows (pp. 375–6):

> The dismissal of the appeal on the part of the United States did not, therefore, preclude the Government from the introduction of new evidence in the District Court *or bind it to the terms of the original decree.*
>
> The authorities cited by counsel to show that when only one party appeals from a decree in a California land case, the other party can not urge objections to the decree or insist upon its modification, have no application. They are adjudications made in cases of appeal from the District Court to the

Supreme Court, where the case is heard on the record from the court below, and where error upon the record alleged by the appellant is alone considered, or in cases where an attempt has been made upon supplementary proceedings on a survey of the land confirmed to deviate from the terms of the original decree. It follows that, could the importers have obtained leave of court to withdraw their application for review, and withdrawn it accordingly, the United States might have been without remedy, but that, having brought the proceeding on for argument, they could not avoid having it fully argued on all points raised.

III.

Had the lower courts considered themselves empowered to pass upon the merits of this case, their decision could not have failed to be for the Government.

The decision of the Board of General Appraisers, which was based upon the Blumlein case, *supra*, can not be supported except upon the theory that that case is still authority upon both points decided. It is, however, clearly overruled by the Erhardt case, *supra*, upon the second point considered, namely, the construction and effect of the statutory provision as to weight of leaf. It had been conceded upon argument of the latter case that the collector's contention could not be sustained without overruling the former.

In the Blumlein case Judge Lacombe treated this question as follows (14 U. S. App., 109):

> The appellant further contends that the eighty-five per cent clause refers only to size and fineness. We do not so read the statute. Though

> awkwardly expressed, its evident meaning is that leaf tobacco, eighty-five per cent of which is of the requisite size, fineness, and weight, is dutiable at 75 cents per pound.

This court followed the plain language of the statute and treated the 85% clause, relating to the size and fineness, as entirely distinct from the clause relating to weight. It held the 85% clause to be applicable to the half-leaves, after the leaf is stemmed. It held the other clause to be applicable to the whole leaf, unstemmed. The interpretation is given in clear language by Mr. Justice Shiras (155 U. S., at p. 136):

> The most natural interpretation of the paragraph in question is to consider eighty-five per cent of half-leaves, or suitable half-leaves eighty-five in number out of half-leaves one hundred in number as the requirement, and to regard the proportion of the weight of the suitable half-leaves to the weight of all the leaves as immaterial.
>
> A further requirement of the act is that the leaves of the collection must be of such average lightness that more than one hundred are required to weigh a pound—that is to say, if the collection should weigh 160 pounds it must contain more than 16,000 leaves; or if some smaller collection, taken as representative of the whole, such as ten hands, should weigh four pounds, this representative collection must contain more than 400 leaves. Here we are not to have in view, as in the other test, the separate parts of the leaves, for the language of the act expressly provides for the condition that "100 leaves are required to weigh a pound." The word *leaves* plainly means leaves in their natural state, or whole leaves.

The application of the rule to the case at bar is clear.

It is held both in the *Erhardt Case*, 155 U. S., at p. 130, and in the *Rosenwald Case*, 35 U. S. App., at p. 98, as in so many prior cases, that the presumption is always with the collector. The Board of General Appraisers, therefore, in order to reverse his decision, was bound to find that he had erred.

No evidence was before it upon which such a finding could be based. It did not appear that 85 % of the leaves were too large. It did not appear that 85 % were too coarse. Nothing whatever appeared as to the average weight of leaf in any of the bales. It did, indeed, appear that some of the bales had been rated as containing 80 % or less of the more highly taxed tobacco. This method of assortment might, however, have been based upon the question of weight alone; and the Treasury practice as to the weight test had no reference to the average weight of leaf in the bale. (Syn. Dec., 8368.)

To obtain information on this point, the Board of General Appraisers should have called upon the collector for further information. This the Board would doubtless have done had not their decision been filed during the period between the Blumlein and Erhardt decisions, when they were proceeding upon a mistaken theory.

It is more than possible that the weight of the average leaf in the bale may have been less than 1/100 lb. in every case in which the examiner returned the bale as containing 50 % of heavy-weight tobacco. This is, indeed, very probable; and it is even probable where the examiner returned a greater percentage of heavy-weight tobacco, for the prevailing weight of Sumatra wrapper

tobacco is very much less than 1/100 lb. per leaf. It is even less than 1/130 lb. per leaf. (Remarks of Senator Platt, Cong. Rec., Feb. 13, 1883, p. 2564.) The heavy-weight leaf, which first began to appear in the later days of the tariff of 1883, seems to have been a comparatively rare variety, which had been discovered to be especially adapted to the requirements of the United States tariff legislation.

We have said that the action of the examiner may have been based upon considerations of weight alone, and not of size or fineness. This is enough for the purposes of the present case. It may be added, however, that this is extremely probable. In every case that has so far come before the courts it has affirmatively appeared either that no examination was made as to size and fineness (all Sumatra leaf tobacco being presumed to be fit for wrappers) or that, an examination having been made, the examiner found that such was the fact. In the Erhardt case the importer claimed at the trial that part of the tobacco was unsuitable in size or fineness, but his claim was based on the fact that some of his tobacco had been broken on the voyage or had been insect eaten, etc.—claims rarely made, and part of which would have been relevant only on an application for an allowance under Rev. St., § 2927, or an abandonment under the Customs Administrative Act, § 23.

We may add in closing that the question before the Board of General Appraisers is plainly one of classification and not of valuation. The duty is specific, not *ad*

valorem; and the commercial value of the tobacco leaf is not affected by its weight. (*Erhardt* v. *Schroeder*, 155 U. S., at p. 130.)

IV.

The importance of the case fully justifies a writ of *certiorari.*

The amount involved, namely, over $691,000, is larger than in any previous tariff case where a writ has been applied for. The case, moreover, involves a definition of the nature of the proceedings for review in the Circuit Court under the Customs Administrative Act. Such proceedings are almost of everyday occurrence, and it is extremely important that their precise nature shall be definitely known.

It is respectfully submitted that the application should be granted.

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